No. 86-1846

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

BURNS SCOTT HOWARD,

Petitioner,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF

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In its responsive brief, the respondent Chesapeake and Ohio Railway Company all but concedes the error of the trial court's instruction that the jury could not consider inflation in calculating petitioner/plaintiff's future damages. Faced with the unequivocal mandate of this Court in *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523 (1983), as well as the United States Court of Appeals for

the Sixth Circuit in *Bach v. Penn Central Transportation Co.*, 502 F.2d 1117 (6th Cir. 1974), that inflation *is* to be considered in calculating future damages, the respondent railroad avoids focusing on the plain error committed by the trial court, and instead searches out every excuse imaginable as to why petitioner was not prejudiced by this erroneous instruction. Seeking to avoid a new trial at which the jury would be *properly* instructed, the railroad erroneously claims (a) that future economic damages were not awarded by the jury; (b) that Dr. Cobb told the jury that they need not consider inflation in calculating future damages; and (c) that the erroneous instruction on inflation was offset by the lack of a present value instruction. Respondent also deliberately leaves the false impression that the issue of inflation was not timely raised before the district court. The following will show that the railroad's attempts to excuse away the trial court's erroneous charge cannot hide the fact that the district court's error is *so fundamental*, and *so crucial* to a fair calculation of future damages in any case, that review should be granted and a new trial awarded.

A. Respondent's Claim that the Jury Awarded No Future Damages is Sheer and Utter Speculation

Respondent seeks to avoid the fundamental error of the trial court's instruction by asking this Court to accept at face value its bald assertion that "future economic damages were not awarded by the jury." (Respondent's Brief p. i) The simple question thus raised is, of course, how does the railroad know that the jury awarded no future damages? Where in the record is there *any* support for this claim? The railroad cannot cite to the record to sup-

port this assertion because it is in fact the product of the railroad's surmise, speculation and wishful thinking. The jury verdict form did not require the jury to break down petitioner's damages into different elements, but instead required the jury to return a *single sum* for all elements of both past and future damages. Under the particular circumstances of petitioner's injuries, where he not only suffered musculoskeletal injuries to his lumbar spine and scapula, but brain dysfunction that was not accurately diagnosed until several years later (including an initial inaccurate diagnosis by the *railroad's* examining doctor, Dr. Granacher, TR 418), the jury could have found that petitioner was totally and *permanently* disabled by either his orthopedic injury or his brain injury, or both. What was missing from the record, however, was *any* evidence from *any* witness that petitioner's disability *ended on the day of trial.* Yet, this is the conclusion respondent would urge here, by claiming that the railroad awarded petitioner his past damages to the time of trial, but not a penny thereafter.

What portion of the jury's verdict was actually intended to compensate him for his future damages? By virtue of the railroad's closing argument, the jury could very well have concluded that the same sum awarded to petitioner for his past wage loss (approximately $101,000.00) would also compensate him for his future damages because of the interest he would earn upon this sum. Urging the jury to use an interest rate of "10 percent," the railroad's counsel told the jury to figure out how much money they wanted to give petitioner a year, and using the amount petitioner had earned his last year of employment (approximately $16,000.00) and the 10 percent market interest rate:

> He would get that money every year for the rest of his life; then when he died, he would still have $160,000.00 to leave to his wife and children. This is what reduction of present worth means. (Respondent's closing argument TR 636-37)

If the jury accepted this part of the railroad's reasoning, it could well have found that petitioner's net future damages averaged over his lifetime wouldn't have exceeded $10,000.00 annually (by virtue of taxes, layoffs, or a whole multitude of other reasons) and thus considered its award of $100,000.00 to be adequate compensation for both past and future damages.

Does this explanation of the jury's verdict require speculation? Of course it does; just as does the railroad's claim that the jury awarded no future damages. In reality, it is impossible for anyone but the jurors themselves to divine what they intended by their verdict. What one can be certain about, though, based on the evidence at trial, is that the jury awarded *some* future damage, and that its *entire award of future damages* was tainted by this erroneous instruction, and petitioner's award correspondingly improperly lessened.

B. Petitioner's Economist Considered Inflation To Be a Critical Part of His Calculations

Contrary to the railroad's repeated misleading characterization of Dr. Cobb's testimony, Dr. Cobb *never* either "expressly and by inference . . . told the jury that they need not consider inflation . . . in assessing petitioner's economic loss." (Respondent's Brief p. 16) Dr. Cobb did indeed testify that inflation "washes out" in his calculations (TR 437) but what the railroad forgets to

add is that Dr. Cobb told the jury that inflation washes out of *both sides* of his calculation, both the earnings side and the interest rate side that is used to discount his earnings to present value. The railroad, on the other hand, washed out inflation only in *one* side of its calculations, the earnings side, and instead used the *market interest rate* of 10 percent when it instructed the jury in its closing argument to reduce petitioner's future damages to present value (TR 636-37). The market rate of interest, of course, is made up mostly of an inflationary component, which is why Dr. Cobb used the real rate of return in his calculations (inflation being "washed out"). Yet, the railroad ignores this crucial distinction, and incorrectly claims Dr. Cobb's calculations didn't consider inflation.

Indeed, it was obvious to the jury from Dr. Cobb's extensive testimony (TR 428-462) that inflation in fact played a *critical role* in his calculations. Dr. Cobb explicitly stated his reliance on inflation in calculating both earnings and the real rate of return (as quoted at length in Petitioner's Brief, p. 7-8). Even his testimony that petitioner's total economic loss could be roughly calculated by multiplying his annual wages (approximately $35,000.00) times his work life expectancy (approximately 43 years) was *premised* upon these critical effects of inflation. Yet, by virtue of the trial court's grievous error, the jury was left with the erroneous impression that Dr. Cobb's numbers were vastly inflated and inaccurate, the net result which was to destroy his credibility and adversely effect the jury's calculation of damages.

C. The Lack of a Present Value Instruction Does Not Vitiate the Trial Court's Erroneous Instruction on Inflation

It is particularly interesting that the railroad now relies so heavily on the district court's failure to give the instruction *it requested* on reduction to present worth, an omission by the trial court to which it *never even objected*. In reality, the railroad had the benefit of this principle, not only by virtue of the common sense and understanding of jurors that money in the hand today is worth more than money to be paid tomorrow; but also by virtue of its closing argument wherein it urged the jury to discount petitioner's future damages by the market rate of 10 percent (an argument that was not contradicted by any instruction).

It must be emphasized that this is *not* a case where counsel for the parties specifically agreed that inflation would precisely offset a reduction to present value, and where neither side argued the point to the jury. Instead, this was a circumstance where one side had the advantage and the other side didn't. The fact that this court in *Jones & Laughlin* recognized that inflation is offset to present value points out the necessity of one balancing the other. Here, there was no inflationary balance to the railroad's present worth argument, the result which worked to the severe prejudice of petitioner.

D. Petitioner Timely Objected to the Trial Court's Erroneous Charge on Inflation

While never directly arguing the point, the railroad purposely seeks to imply in its brief that Petitioner did not properly or timely raise the erroneous inflation instruction before the district court. (Respondent's Brief

p. 12-13) To the contrary, both the district court and the court of appeals recognized that the objection was timely made. (App. 8) The objection was made after the charge, instead of before, because the trial court did not provide counsel with its proposed charge until immediately after the conclusion of testimony and between the parties motions for directed verdicts, and right before closing arguments. (TR 559-600) Petitioner's counsel did not have the opportunity to closely review the charge and object until after it was given (but before the submission of the case to the jury). He then made his objection at the time designated by the trial court and even cited the *Jones & Laughlin* and *Bach v. Penn Central* cases relied upon here. (TR 656-57) Petitioner's objection to this erroneous instruction on inflation was both proper and timely, preserving this issue for review here.

CONCLUSION

The Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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